

1 John S. Williamson, Bar No. 106485
2 jwilliamson@williamsonlawgroup.net
3 Connie L. Benson, Bar No. 185680
4 cbenson@williamsonlawgroup.net
5 WILLIAMSON LAW GROUP
6 1851 East First St., Suite 1225
7 Santa Ana, CA 92705
8 (657) 229-7400/FAX: (657) 229-7444

9 Attorneys for Defendants, STEVEN KILTY; FBN TRANSPORTATION, LLC; AMSTON
10 SUPPLY, INC.; MARDAN TRANSPORTATION, LLC

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 MARGARET KEIPER, et al.,
14 Plaintiffs,
15 VS.
16 VICTOR VALLEY TRANSIT
17 AUTHORITY, etc; et al.,
18 Defendants.

19 AND ALL RELATED ACTIONS

20) CASE NO. EDCV 15-00703-BRO(SPx)
21) EDCV 15-00762-BRO(SPx)
22) EDCV 15-01481-BRO(SPx)
23) EDCV 15-02380-BRO(SPx)
24)
25) OPPOSITION OF TRUCKING
26) PLAINTIFFS TO UNITED STATES OF
27) AMERICA'S MOTION TO DISMISS
28) THIRD PARTY COMPLAINT;
) MEMORANDUM OF POINTS AND
) AUTHORITIES; DECLARATION OF
) JOHN S. WILLIAMSON;
) DECLARATION OF DAVID ROYER;
) DECLARATION OF KEITH
) ZINKOWICH; DECLARATION OF
) STEVEN KILTY

DATE: JANUARY 4, 2016
TIME: 1:30 P.M.
COURTROOM: 14, 312 N. Spring St.
Los Angeles, CA 90012
HON. BEVERLY REID-O'CONNELL

MEMORANDUM OF POINTS AND AUTHORITIES

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1 I. INTRODUCTION

2 Third Party Plaintiffs, FBN Transportation, LLC, and its driver, Steve Kilty,
3 respectfully submit the following Opposition to the Motion of the Third Party
4 Defendant, United States of America (herein referred to as “United States”), to Dismiss
5 for Lack of Jurisdiction under *FRCP* Section 12(b)(1). As will be shown, the United
6 States adopted specific, mandatory, traffic control MUTCD Standards which were not
7 followed and which caused or contributed to the accident giving rise to the underlying
8 consolidated lawsuits.

9 II. NATURE OF RELIEF SOUGHT

10 FBN Transportation, LLC and Steven Kilty (hereinafter referred to individually
11 as “FBN” and “Kilty”, or together as the “Trucking Plaintiffs”), do not seek affirmative
12 relief in their Third Party Complaint. Rather, the Trucking Plaintiffs seek contribution
13 from the United States on the claims for damages brought against them by bus
14 occupants involved in the subject traffic accident, occurring on Fort Irwin premises on
15 June 2, 2014.

16 III. FACTS IN BRIEF

17 A. **The Trucking Plaintiffs**

18 FBN is a motor carrier based in Athens, Wisconsin, licensed by the U.S.
19 Department of Transportation to transport freight (Zinkowich decl. P2). Kilty is a truck
20 driver licensed to operate commercial vehicles (Kilty decl. P1). Kilty was dispatched
21 by FBN to pick up and deliver a piece of equipment known as a “wrecker” from
22 Oshkosh, Wisconsin to the Fort Irwin NTC at the request of the United States. Kilty
23 transported the wrecker on a trailer towed by a motor unit typically referred to as a
24 tractor (Zinkowich decl. P4).

25 B. **Arrival at Fort Irwin**

26 Kilty drove from Wisconsin through Barstow, California. He continued on Fort
27 Irwin Road and arrived at the Fort Irwin NTC during the night time hours on June 1,
28 2014.

1 He was directed from Fort Irwin Road to the Fort Irwin By-Pass Road by a fixed
2 roadway sign stating all trucks were to exit and continue on the Fort Irwin Bypass Road
3 (Kilty decl. P4). Over the course of the next three miles Kilty observed roadway signs
4 on his right side. The first sign read "Prepare to Stop". The next sign read "Check-in
5 Point". Neither sign displayed limited hours of operation (Id. P5).

6 A third sign, which read "Trucks Stop Here", was located at the Check-in Point.
7 The signage was affixed to a jersey-type barrier, faced the By-Pass Road, and was
8 clearly visible from the roadway. Base entrance check-in hours of 6:00 a.m. to 8:00
9 a.m. were also posted on the sign (Id. P6).

10 **C. Kilty's Prior Delivery to Fort Irwin**

11 Kilty had made a prior delivery to Fort Irwin NTC, several months earlier. On
12 that occasion, he arrived during the morning hours and observed dozens of cargo trucks
13 stopped and waiting in front of him in the right hand lane of the Bypass Road. Upon
14 his arrival, he observed the trucks in a line, moving up, one by one, going through check-
15 in procedures at the Check-in Point while remaining in the right hand lane. He was
16 advised at that time that entry into the base was permitted only between the hours of
17 6:00 a.m. and 8:00 a.m. and that trucks waited in the number two lane and continued
18 toward the main gate only after receiving clearance to proceed by Military personnel at
19 the Check-in Point (Id. P8).

20 **D. Compliance with Sign Directions**

21 Kilty followed the sign's mandate to stop at the Check-in Point. He stopped his
22 tractor-trailer in the right lane where he and other truck drivers had stopped while being
23 "checked-in" on his prior delivery. Kilty retired to his sleeper birth in the tractor to
24 sleep while awaiting check-in procedures to begin at 6:00 a.m. He was awakened when
25 his vehicle was rear-ended by the VVTA bus before 5:30 a.m. (Id. P7-8).

26 Following the accident, Kilty was interviewed by a Fort Irwin Policeman. He
27 was assured that he had followed base check-in procedures appropriately and had done
28 nothing wrong (Id. P9).

1 **IV. THIS COURT HAS JURISDICTION AS THE DISCRETIONARY**
 2 **FUNCTION EXCEPTION IS INAPPLICABLE**

3 The Discretionary Function Exception to the FTCA provides sovereign immunity
 4 for the United States against "[a]ny claim based upon the exercise or performance or
 5 the failure to exercise or perform a discretionary function or duty on the part of a federal
 6 agency or an employee of the Government, whether or not the discretion involved be
 7 abused." 28 U.S.C. § 2680(a)

8 The Government "bears the burden of proving the applicability of one of the
 9 exceptions to the FTCA's general waiver of immunity" because such an exception "is
 10 analogous to an affirmative defense" to correctly place the burden on "the party which
 11 benefits from the defense." *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992).
 12 "The FTCA, as a remedial statute, should be construed liberally, and its exceptions
 13 should be read narrowly." *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002)
 14 (citing *Kielwien v. United States*, 540 F.2d 676, 681 (4th Cir. 1976), cert denied, 429
 15 U.S. 979 (1976)).

16 Two Supreme Court cases control the application of this exception to the FTCA.
 17 See *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. Gaubert*, 499 U.S.
 18 315 (1991). The so-called Berkovitz-Gaubert test holds that the DFE applies "only if
 19 two conditions are met: (1) the acts alleged to be negligent must be discretionary, in
 20 that they involve an 'element of judgment or choice' and are not compelled by statute
 21 or regulation and (2) the judgment or choice in question must be grounded in
 22 considerations of public policy or susceptible to policy analysis."

23 **A. Leaving an Uncovered Temporary Traffic Control Sign In Plain View**
 24 **When Not in Use, is Not an Act Subject to Discretion**

25 The discretionary element is not met where "a federal statute, regulation, or
 26 policy specifically prescribes a course of action for an employee to follow." *Berkovitz*,
 27 486 U.S. at 536, 108 S.Ct. 1954 (internal quotation marks and citation omitted). In such
 28 event, our inquiry is at an end, and the discretionary function exception does not apply

1 because “the employee has no rightful option but to adhere to the directive.” *Id.*

2 The Declaration of Michael V. Butolph that accompanies the United States’
 3 moving papers identifies regulations promulgated by the Department of Defense, the
 4 U.S. Army, and Fort Irwin NTC that govern base traffic operations. The three sources
 5 of authority identified by Mr. Butolph each mandate traffic control compliance with
 6 safety standards issued or endorsed by the Federal Highway Administration (“FHWA”)
 7 in the Manual on Uniform Traffic Control Devices (“MUTCD”) (*See DOD Instruction*
 8 *6055.04, Requirement 2(b), motion Exhibit “A”*); *Army Regulation 190-5,*
 9 *Responsibility (h)(3), motion Exhibit “B”*; and, *NTC Regulation 190-5, Chapter 2-1*
 10 *Traffic Control Devices, motion Exhibit “C”*).

11 The MUTCD is approved by the Federal Highway Administration as the National
 12 Standard in accordance with Title 23 U.S. Code, Sections 109(d), 114(a), 217, 315, and
 13 402(a), 23 CFR 655, and 49 CFR 1.48(b)(8), 1.48(b)(33), and 148(c)(2). The MUTCD
 14 has been adopted by California in accordance with Section 21400 of the California
 15 Vehicle Code.

16 The MUTCD prescribes a specific mandatory Standard for the disposition of
 17 Temporary Traffic Control (“TTC”) signage during periods when the TTC measures
 18 are not in effect. Section 6B.01 (09) states:

19 “All TTC devices shall be removed as soon as
 20 practicable when they are no longer needed. When work
 21 is suspended for a short period of time, TTD devices
 22 that are no longer appropriate shall be removed or
 23 covered.” (Emphasis added)

24 The check-in point on the Fort Irwin Road was “temporary” as it was allegedly
 25 in operation temporarily, for only two hours each weekday (See Motion, page 5, lines
 26 1-4). The check-in point utilized a “temporary” barricade, to which the “Trucks Stop
 27 Here” was affixed (See Motion, page 5, lines 6-8). Each morning, a temporary check
 28 point was set up for use only during peak hours (Declaration of Butolph, page 7, lines

1 25-28).

2 According to Mr. Butolph, the United States' requirement for trucks to stop at
 3 the Check-in Point existed temporarily, for two hours only each weekday, between 6:00
 4 a.m. and 8:00 a.m. At all other times, the stopping requirement was not in effect
 5 (Butolph declaration, page 9, lines 21-27).

6 Each morning at 8:00 a.m., the Check-in Point was closed and vacated of
 7 personnel. The "Trucks Stop Here" sign was left uncovered, on the side of the road,
 8 prominently displayed, facing traffic, in plain view of the motoring public. This can be
 9 seen in the photograph marked as Exhibit "K" to the Motion to Dismiss.

10 The MUTCD requirement that the TTC sign be removed when not in use was not
 11 met. The requirement that this TTC sign be covered when not in use was not met. The
 12 act of removing and/or covering this sign is not subject to discretion. The MUTCD
 13 Standard states removal or covering of signage "shall" occur when not in use. Removal
 14 or covering is a mandatory requirement designed to prevent the type of tragic accident
 15 that occurred here.

16 **B. Failing to Post Operational Hours on an Advance Warning Sign is Not
 17 an Act Subject to Discretion**

18 Preferential and managed traffic lanes are those put to specialized treatment for
 19 non-standard uses. Preferential and managed lanes can be operated on a 24 hour basis,
 20 or during peak traffic hours only, such as employed by the United States at the
 21 temporary Check-in Point (See MUTCD Section 2G.01 (01) – (07)).

22 Where a general purpose lane becomes a preferential lane, a "Preferential Lane
 23 Advance sign shall be used for advance notification" (MUTCD Section 2G.06 (02)).
 24 The MUTCD requires the advance notification sign to include the specific hours and
 25 days of operation for preferential lanes that operate on a part-time basis. MUTCD
 26 section 2G.06 (07) makes the inclusion of the specific hours and days mandatory by
 27 stating this information "shall" be required on a plaque affixed below the sign. This
 28 Standard was not met (see Declaration of Kilty Par. 5).

1 This specific mandatory requirement could have easily been fulfilled had the
2 required plaque been affixed below the “Prepare to Stop” sign located in advance of the
3 Check-in Point, with the specific hours and days when a driver should be prepared to
4 stop.

5 **C. Failing to Display the “OPEN/ CLOSED” Status of the Check-in Point is
6 Not an Act Subject to Discretion**

7 The management of truck traffic to include stopping in a preferential lane during
8 certain hours of certain days requires the use of a “changeable message sign” stating
9 whether the Check-in Point is open or closed:

10 “The provisions of [MUTCD] Sections 2G.03
11 through 2G.07 regarding regulatory signs for Preferential
12 lanes shall apply to managed lanes operated at all times or
13 at certain times ... by using vehicle type restrictions as a
14 congestion management strategy. Such managed lanes
15 shall use changeable message signs or changeable
16 message elements within static signs to display the
17 appropriate regulatory sign messages only when they are
18 in effect.

19 “When certain types of vehicles (such as trucks) are
20 prohibited from using a managed lane or when a managed
21 lane is restricted to use by only certain types of vehicles
22 during certain operational strategies, regulatory signs or
23 regulatory panels within the appropriate guide signs that
24 include changeable message elements shall be used to
25 display the open/closed status of the managed lane for
26 such vehicle types” (MUTCD Section 2G.03 (23) and
27 (24), emphasis added).

28 Use of a changeable message sign displaying the “open/closed status” of the

1 Check-in Point is made mandatory by the MUTCD. Signage identifying the Check-in
 2 Point did not comply (see Exhibit “J” Motion to Dismiss). The “Check-in Point”
 3 message display of “CLOSED” or “OPEN”, was clearly designed to avoid driver
 4 confusion where preferential lane management is in effect.

5 **D. The Restriction of All Bus Traffic to an Exclusive Lane of Traffic
 6 Required the United States to Use Specific Traffic Control Signs and Pavement
 7 Markings**

8 The restriction of bus traffic to the left lane of the bypass road required the United
 9 States to implement appropriate traffic control devices mandated by MUTCD for
 10 management of Preferential Lanes of Traffic. Both regulatory signs and pavement
 11 markers (“BUS ONLY”) “shall be used to advise road users.” (See MUTCD Sections
 12 2G.01(01) and 2G.03 (01).

13 The required signs were not used. The mandatory pavement markings were not
 14 used. Instead the United States chose to notify users of the lane restriction by personal
 15 communication to unidentified “companies”, and later, directly to VVTA (Decl.
 16 Butolph P8C).

17 **E. Design Decisions vs. Implementation Requirements**

18 “[T]he design of a course of governmental action is shielded by the discretionary
 19 function exception, whereas the implementation of that course of action is not.”
 20 *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005).

21 “Whether a challenged action falls within the discretionary function exception
 22 requires a particularized analysis if the specific agency action challenged”
 23 (*GATX/Airlog Co. v. United States*, 286 F.3d 1186, 1174 (9th Cir. 2002)). To identify
 24 the particular agency conduct with which Plaintiffs take issue, the allegations of
 25 Plaintiff’s Complaint must be examined (*Whisnant v. United States*, *supra*, at 1184-85).

26 The charging allegations in the Complaint of the Trucking Plaintiffs are identified
 27 in Paragraph 29, subsections (a)-(l). The selection of the type of traffic control plan to
 28 fit security needs at Fort Irwin NTC is within the discretion of the United States. The

1 failure to follow self-imposed, prescribed and mandatory MUTCD Standards in the
2 implementation of the plan is not subject to policy considerations.

3 **V. JURISDICTIONAL DISCOVERY**

4 The Trucking Plaintiffs have had no opportunity to seek discovery from the
5 United States. Pre-litigation FOIA requests placed upon the United States have been
6 ignored. Despite the passage of more than 18 months since the subject accident, the
7 United States has not released either the Criminal or Traffic Collision Investigation
8 Reports. Video taken from the subject bus, Electronic Control Unit (“black box”) Data
9 from the bus, or for that matter, a definitive list of bus occupants has not been released.
10 At no time prior to its filing of the motion at bar has the United States identified and
11 described the nature or details of its traffic control plan at Fort Irwin. (See Declaration
12 of John Williamson)

13 “[W]here pertinent facts bearing on the question of jurisdiction are in dispute,
14 discovery should be allowed.” *American West Airlines, Inc. v. GPA Group, Ltd.*, 877
15 F2d 793, 801 (9th Cir. 1989). Given the inability of the Trucking Plaintiffs to obtain
16 information relative to the Fort Irwin traffic plan, independent of that presented in this
17 motion, these parties seek leave to conduct discovery should the Court be inclined to
18 otherwise grant the motion.

19 **VI. IDENTITY OF THE UNITED STATES IN TRUCKING PLAINTIFFS'**
20 **COMPLAINT**

21 Moving party, in footnote 3 on page 7 of its moving papers, claims the “United
22 States” to be the only appropriate party under the FTCA and seeks dismissal of the
23 Complaint because the Trucking Plaintiffs have named the “United States Department
24 of the Army Fort Irwin Training Center”. Moving party cites only *Kennedy v United*
25 *States Postal Service*, 145 F3d 1077, 1078 (9th Cir. 1998) in Support of this claim.

26 The Kennedy court affirmed dismissal of a postal worker’s “employment-related
27 tort claims” brought under the FTCA, because “Federal employees alleging
28 employment-related tort claims subject to the Civil Service Reform Act may not bring

1 an action under the FTCA" (*Id. at 1078*). As such, Plaintiff's request for leave to amend
2 was denied as being futile. The Court cited *Continental Cablevision v. United States*
3 *Postal Serv.*, 945 F.2d 1434 (8th Cir.1991) to support that the United States Postal
4 Service is a legal entity separate and apart from the United States (*Id. at 1440*).

5 The United States in this case has made no showing that the United States
6 Department of the Army Fort Irwin Training Center is a distinct entity, separate from
7 the United States. Nor has The United States demonstrated an amendment would be
8 futile due to the inapplicability of an independent statutory prohibition against the
9 pursuit of claims herein by Trucking Plaintiffs. If however the Court is inclined to
10 dismiss based on the manner in which Trucking Plaintiffs have identified the United
11 States, leave to amend is respectfully requested.

12 **CONCLUSION**

13 Based on the foregoing, it is respectfully requested that the Motion of the United
14 States to dismiss under FRCP 12(b)(1) be denied.

15 DATED: December 14, 2015

WILLIAMSON LAW GROUP

16
17 /s/ John S. Williamson

18 John S. Williamson

19 *jwilliamson@williamsonlawgroup.net*

20 Attorneys for Defendants, STEVEN KILTY;
21 FBN TRANSPORTATION, LLC; AMSTON
SUPPLY, INC.; MARDAN
TRANSPORTATION, LLC

1 CERTIFICATE OF SERVICE
2

3 I hereby certify that on December 14, 2015, I electronically transmitted the
4 following document(s) to the Clerk's Office using the CM-ECF System for filing and
transmittal of Notice of Electronic filing to the following CM-ECF registrants:
5

6 **DOCUMENT(S) SERVED:**
7

8 OPPOSITION OF TRUCKING PLAINTIFFS TO UNITED STATES OF
AMERICA'S MOTION TO DISMISS THIRD PARTY COMPLAINT;
MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JOHN
S. WILLIAMSON; DECLARATION OF DAVID ROYER; DECLARATION OF
KEITH ZINKOWICH; DECLARATION OF STEVEN KILTY
9

10 **PARTIES SERVED:**
11

12 Martin D. Gross
13 Martin@lawgross.com
14 LAW OFFICES OF MARTIN D. GROSS
15 2001 Wilshire Blvd., Suite 205
16 Santa Monica, CA 90403
17 (310) 453-8320/FAX: (310) 861-1359
**ATTORNEYS FOR PLAINTIFFS, MARGARET KIEPER AND DAIL KIEPER,
JR., INDIVIDUALLY AND AS THE SUCCESSORS-IN-INTEREST TO DAIL
KIEPER, SR., DECEASED**

18 Douglas F. Welebir
19 dfw@wtw-law.com
WELEBIR TIERNEY & WECK
20 2068 Orange Tree Lane, Suite 215
21 Redlands, CA 92374
22 (909) 335-0444/FAX: (909) 335-0452
**ATTORNEYS FOR PLAINTIFFS, MICHAEL CHESTNUT, MISIONA
TUSIESEINA, PEDRO MIRANDA**

24 Kevin L. Elder
25 kelder@penneyandassociates.com
PENNEY & ASSOCIATES
26 6536 Lonetree Blvd.
27 Rocklin, CA 95765
28 (916) 786-7662 / (916) 786-0144

1 ATTORNEYS FOR PLAINTIFFS, JESUS AGUILAR, NAIOMI BRIDGETTE,
2 JERMAINE RATLIFF, a minor, by and through his Guardian ad Litem, NAIOMI
3 BRIDGETTE

4 James R. Tedford II, Esq.
5 ted@tedfordlaw.com
6 TEDFORD & ASSOCIATES
7 301 E. Colorado Blvd., Suite 514
8 Pasadena, CA 91101
9 (626) 793-8607/FAX: (626) 793-7293

10 **ATTORNEYS FOR PLAINTIFF, DINORAH AGUILAR**

11 Adrianos Facchetti, Esq.
12 adrianos@facchettilaw.com
13 reagan.facchettilaw@gmail.com
14 LAW OFFICES OF ADRIANOS FACCHETTI, PC
15 301 E. Colorado Blvd, Suite 514
16 Pasadena, CA 91101
17 (626) 793-8607/FAX: (626) 793-7293

18 **ATTORNEYS FOR PLAINTIFF, DINORAH AGUILAR**

19 Marisa Rodriguez-Shapoval
20 mrodriguez-shapoval@wwhgd.com
21 Jeremy R. Alberts, Esq.
22 jalberts@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
(702) 938-3838/FAX: (702) 938-3864

23 **ATTORNEYS FOR DEFENDANTS, VICTOR VALLEY TRANSIT
24 AUTHORITY, TRANSDEV SERVICES, INC., VEOLIA TRANSPORTATION
25 SERVICES, INC., DINORAH AGUILAR**

26 Andrea Alexander, Esq.
27 ana@alexanderlawpc.com
28 ALEXANDER LAW GROUP, PC
10960 Ventura Blvd., Second Floor
Studio City, CA 91604
(818) 237-3179

**OF COUNSEL WITH WEINBERG, WHEELER, HUDGINS, GUNN & DIAL,
LLC, ATTORNEYS FOR DEFENDANTS, VICTOR VALLEY TRANSIT**

1 AUTHORITY, TRANSDEV SERVICES, INC., VEOLIA TRANSPORTATION
2 SERVICES, INC., DINORAH AGUILAR

3 Loretta E. Lynch
4 Attorney General of the United States

5 Laura E. Duffy
6 United States Attorney

7 Katherine L. Parker
8 katherine.parker@usdoj.gov

9 Glen F. Dorgan
10 glen.dorgan@usdoj.gov

11 Valerie E. Torres
12 valerie.torres@usdoj.gov
13 Special Attorneys to the Attorney General

14 Office of the U.S. Attorney
15 880 Front Street, Room 6293
16 San Diego, Ca 92101
17 (619) 546-7665 / (619) 546-7751

18 **ATTORNEYS FOR THIRD-PARTY DEFENDANT UNITED STATES OF
19 AMERICA**

20
21 */s/ Brenda Rowland*
22 BRENDAL ROWLAND
23
24
25
26
27
28